THE

GEORGE WASHINGTON UNIVERSITY

NAVY GRADUATE COMPTROLLERSHIP PROGRAM

LEGISLATION BY APPROPRIATION

BY

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For

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PREFACE

This treatise is an elementary exploration into an American phenomenon --- a budgetary process that permits "legislation by appropriation". The primary method is essentially a narrative. The step by step story of the old American political game of taking a bill which cannot pass on its own merits and easing it through as a "rider" on an appropriation bill. The narrative will stop at odd times to ponder over the intracasies of the congressional segment of the budgetary process, with the emphasis on the power of the sub-comittee chairman, the power (or lack of it) of the lobbyist, and the enigma of how a "rider" that nobody wanted just happened to be enacted into law. The utter helplessness of a president caught with the fiscal year already two weeks underway without an appropriation bill enacted, having to approve the "rider" if he wants the appropriations and not desiring to chance chaos by vetoing the appropriation bill, is a curious by-play to the budgetary process.

All the material used in the preparation of this paper was the original source material as shown in the bibliography, no other author's work in either published or unpublished form can be blamed as a moulder of the opinions set forth here. Likewise the opinions expressed do not represent the Department of Defense, the Department of the Navy, the George Washington University, or the Navy Graduate Comptrollership Course.

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CHAPTER I

THE ORIGINS OF SECTION 638, P. L. 157

The fact that "things are not what they seem" is a truism that never fit a case more perfectly than its application to section 638 of H. R. 6042. H. R. 6042, destined to become Public Law 157 - 84th Congress Chapter 358 - 1st Session, was a bill authorizing the appropriations for the entire Department of Defense for the fiscal year ending June 30th, 1956. This appropriation, making up one of the major portions of the entire Federal budget, had attached to it, as next to the last section, a paragraph which read as follows:

> Section 638 - No part of the funds appropriated in this Act may be used for the disposal or transfer by contract or otherwise of work traditionally performed by civilian personnel of the Department of Defense unless it has been justified before the appropriate committees of Congress that the disposal is economically sound and that the related services can be performed by a contractor without danger to national security.

This section, from the introduction of the bill, through all the hearings, debates on the floor, and final passage, was to provoke more controversy, lobbying, and pressures pro and con, than any other single section, and its culmination was perhaps the most sharply worded message that President Dwight D. Eisenhower ever sent to Congress. However, unless the origins and reasons for the insertion of Section 638 are clearly understood, the conclusions arrived at from a casual reading of the hearings pertaining to this section, the final draft of the section as

enacted into law, and the president's acid comments upon it, might lead to an entirely erroneous concept of the forces at play both for and against it. The obvious conclusions are fallacious. The lobby pressures directed against this section were tremendous; the president's remarks intemperate; and, all in all, a seething cauldron of sandpapered feelings generated that was really a tempest in a tea pot. Most of this could have been avoided if the purport and motives of the originator were thoroughly understood.

The origins of Section 638 lie in a bill introduced by Congressman Robert L. F. Sikes of Florida on March 21st, 1955, H. R. 5115 84th Congress 1st Session, which said in its entirety:

> A BILL to prohibit the disposal, by contract or Executive order, of work traditionally performed by civilian components of the Department of Defense.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Department of Defense or any component thereof is hereby prohibited to dispose of, by contract or Executive order, work traditionally performed by civilian components of the Department of Defense unless it can be conclusively proven by an impartial board that the disposal is economically sound and that the related services can be performed by a contractor without danger to national security.

At first glance, the obvious purpose of the bill would be to protect the career civil service employee of the Defense Department from the avowed intention of the Department to withdraw to the maximum extent possible, from ownership and operation of commercial and industrial-type facilities, consistent with the best interests of national security. This policy doomed the continued existance of such facilities and activities as coffee roasting, ropemaking, plate manufacture, bakery operations, laundry operations, cleaning and dyeing operations and comparable types of activities. The complete list[1] comprises 41 types of facil-

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[1] U. S. Department of Defense Instructions 4100.16 of 8 Mar 1954, 4100.17 of 28 Jun 1954, and 4100.18 of 13 Oct 195[illegible]

ities which total over 1,000 specific activities. It is logical therefore to assume that the powerful civil service employee associations were exerting political pressure to perpetuate these activities, and incidently their positions, by this means in the face of the Executive Department's stated policy from the President and Secretary of Defense Wilson of not competing with private industry wherever and whenever possible.

Logical as this supposition is, it is fallacious. For a long time Congressman Sikes was concerned with another side of the issue entirely. The telephone company throughout the nation for many years has attempted to 'sell' the various services the idea of manning the switchboards at all military activities with telephone company employees. This plan has some merit; on the one hand, the telephone company has a profitable service to sell on a contractual basis and on the other hand, the telephone company would offer complete repair and maintainence service on the equipment and, most important, they would offer the services of trained and efficient operators at the military activities of the same competence as in use at city switchboards. All this looked mutually advantageous to both the telephone company and the government. But then the rude awakening came with the disasterous telephone strike against the Southern Bell Telephone Company in 1954. Not only was service disrupted, but the strike grew more bitter day by day with 'unexplained' damage occurring and the national security effected. If the internal switchboards of the military installations had been manned by striking employees of the telephone company, the effects of the strike upon the national security would

have increased many fold. It was this situation, much of it taking place in Congressman Sikes' home territory, which raised serious doubts in his mind over the wisdom of withdrawing from the commercial-type activities entirely and having these services and manufactures accomplished by contract.

When H. R. 6042 was submitted by Congressman George H. Mahon, the original bill contained a section 639 which read exactly, word for word, the same as Congressman Sikes' bill, H. R. 5115 except that the words "it can be conclusively proven by an impartial board that the disposal is economically sound" now read "it has been justified before the appropriate committees of Congress that the disposal is economically sound". It is to be noted that Congressman Sikes of Florida and Congressman Mahan of Texas are both members of the Committee on Appropriations and that Mr. Sikes is Chairman of the Sub-committee on Department of the Army Appropriations and that Mr. Mahon is Chairman of the Sub-committee on Department of the Air Force Appropriations.

The bill, as submitted, was referred to the Committee on Appropriations and the various sections further referred to the appropriate sub-committees. It is in the hearings of the sub-committees that the section under scrutiny received its most interesting treatment and it is the intent of this paper to follow the argument through the hearings, conferences, and debates to its illogical conclusion. However, for clarity, the section will always be referred to as Section 638, the section's number in Public Law 157, altho in the various revisions of the bill and through its various printings during amendment and conference, the section number varied between 639 and 638 almost alternately.

CHAPTER II

THE HEARINGS BEFORE THE SUB-COMMITTEES and DEBATES ON THE FLOOR IN THE HOUSE AND SENATE

The House Sub-committee on Department of Defense Appropriations commenced hearings on Monday, January 31, 1955, but it was not until three weeks later that any reference to Section 638 entered the hearings. On Monday, February 21, 1955, Assistant Secretary of Defense (Supply and Logistics) Thomas P. Pike, as preliminary data to his testimony, submitted a statement, page twelve of which, contained in general terms the provisions of the Department of Defense Instructions previously cited. In Mr. Pike's statement, under the sub-head "COMMERCIAL AND INDUSTRIAL TYPE FACILITIES" the following two paragraphs appeared:

> On November 24, 1953, the Secretary of Defense issued a policy statement that the Department of Defense would withdraw to the maximum extent possible from ownership and operation of commercial and industrial type facilities, consistent with the best interests of national security. By means of a series of subsequent Department of Defense directives and instructions, a detailed program has been developed to insure that facilities will not be continued in unwarranted competition with private enterprises and that maximum utilization will be made of justifiable facilities through cross servicing.
>
> To date, three groups of existing commercial and industrial type facilities to be reviewed under the program have been undertaken. These three groups include 41 types of facilities which total over 1,000 specific activities. Additional groups will be undertaken as early as possible, and future procedures of review will conform with the newly established Bureau of the Budget review program.

Here we have the first indication that Section 638 of the bill is diametrically opposed to a policy that the Executive De-

partment has been pursuing for over a year. However, it is also obvious that the members of this sub-committee have only a passing interest in Section 638. After a few perfunctory questions by the chairman and Congressman Edward T. Miller of Maryland, the subject and its policy, at complete variance with the bill, was allowed to drop. Nowhere else in the House hearings do we find any other mention of Section 638, or any witnesses who ask to testify either for or against its provision. The various National Associations of merchants representing every field of trade were napping blissfully unaware of its existance; or perhaps, they were lulled into a false sense of security and complacency by the benevolent attitude of the Executive Department toward removing the Armed Services' competition with private industry and the Department of Defense Instructions implementing that stated policy. In any event, nowhere in the House hearings on the Defense, Army, Navy, or Air Force budgets does the opposition clamor to be heard and set forth their arguments to fight this threat to a policy they have worked so long and hard to bring about. Mr. Pike testified in January, but in late May before the Senate sub-committee the opposition is alerted, armed (with facts, figures, and philosophy), organized and ready to do battle.

On Friday, May 27, 1955, Senator Dennis Chavez of New Mexico, Chairman of the Sub-committee for Department of Defense Appropriations of the Senate Committee on Appropriations called Mr. Ralph B. Dewey, Washington representative (Washington repre-

sentative is oft-times synonymous with registered professional lobbyist) of the Pacific American Steamship Association. Mr. Dewey's testimony is quoted almost completely and verbatim for three reasons; first, as the first witness Mr. Dewey sets the stage for the succeeding witnesses with the entire philosophy of the opposition; second, it is not desired to quote out of context and perhaps distort unmeaningly the words of the witness; and third, Mr. Dewey not only sets the stage with the philosophy of the opposition , he also sets forth the very convincing substantive arguments which should weigh heavily with logical, deliberative, and impartial legislators. With the succeeding witnesses a briefer treatment will be given in the interest of brevity and 'not fogging the air' with irrelevancies, verbal prestidigitation, and redundancies; however, where a new argument or idea is put forth, the attempt will be made to lift it out of context while faithfully preserving the original intent. The long succession of witnesses is purposely recorded in detail to show the weight of the opposition and how it went for naught. The opposition was organized and presented their case well; but their appeal made little impression (against not a single proponent's testimony) with the sponsors of the section.

Mr. Dewey mounted the witness chair and testified as follows:

> My name is Ralph B. Dewey, Washington representative of the Pacific American Steamship Association, headquarters in San Francisco, which association comprises the principal ship operators on the Pacific coast.
>
> I am sure that the members of this sub-committee and

the full committee are keenly aware that the steamship industry at the present time is one which is very definitely in competition with the Defense Department's merchant marine, the so-called Military Sea Transportation Service. I am not prepared in these proceedings to open the subject of the degree of that competition; how much of it is logical, proper, fair, or otherwise equitable. I do, however, simply wish to orient my testimony to this fact, that we are in competition on many trade routes directly, daily, with ships operated by the Federal Government, carrying in many cases commodities identical to the ones we are, not special commodities but general merchandise. And, as such, we feel constrained to testify in these proceedings on a matter such as section 638 which really deals with one of the fundamental matters of public policy in our present-day Government. With that preliminary statement, I would like to read a very brief statement.

I should first state that other steamship groups from both coasts --- I represent, of course, the west coast --- from the east coast and all other steamship associations have communicated separately with this committee and the views that I represent here this morning have been expressed by them.

I will simply elaborate upon what is generally the view of the steamship industry today.

Our opposition to section 638 stems from a fear that this section will:

1. Supercede certain executive department agreements that affect the relationships between the Defense Department and the shipping industry.

2. Violate the intent of Congress as expressed in various statutes.

3. Put the damper on any action which might flow from recommendations of the Government Operations Committee of Congress or from the Hoover Commission reports, both of which groups have studied this precise problem for a considerable time.

4. Hamper progress already made by the Defense Department itself and the various committees within the Department that are studying areas where the Government can safely get out of business enterprises.

The proponents, of course, disclaim any intent in section 638 to stop the institution of economies or essential changes in Government enterprises and emphasize

that they simply want to provide Congress through its appropriate committees with the final veto on any change in the status of Defense Department activities. In practice, however, it seems obvious that the clumsiness of a procedure which requires a myriad of details to come before busy congressional committees and the attendant risk of jurisdictional controversies could, in and of themselves, make the plan quite unworkable and could effectively stop many plans for instituting economies within the Defense Department.

I use that word 'unworkable' I might call your attention to several phrases in section 638 that are very unclear, are rather new in statutory language, and might require endless interpretation.

The retention of section 638, in our view, would be the violation of a fundamental principle of our legislative process, which provides that whenever the basic principle of policy of our economic system is to undergo a major overhaul that such proposal should be the subject of exhaustive inquiry, and study by the committees of Congress within whose jurisdiction such basic principle resides. This is much too great a problem and involves a far too important public-policy question to be submerged in an appropriations measure. We respectfully urge that the Appropriations Committee delete section 638 and defer the matter to the substantive committees in both Houses, specifically the Government Operations Committees, whose responsibilities for investigating and recommending legislation regarding Government operations are established by resolution of the Congress.[1]

It might be well at this point to interrupt Mr. Dewey's testimony to belabor this one point. Congressman Vinson of Geogia will pick up this very same point again in the debate on the floor of the House so it is well to mark it here as one of the salient points of this entire thesis. The objection to this section 638 is on strong legal grounds that it is 'unethical' and contrary to the spirit of our legislative process if not down

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[1]Hearings before the Sub-committee of the Committee on Appropriations United States Senate, Dept of Defense Appro for '56 pp 1243-7. U. S. Govt Printing Office 1955

right unconstitutional to squeeze legislation through which is of a controversial nature and might have trouble passing on its own merits, or even have absolutely no chance of passing on its own, especially if a Presidential veto is a certainty, by tacking it as an additional section, amendment, or 'rider' to an appropriation bill. Of course, the most famous of these riders was the Platt Amendment which was a rider to the Army Appropriations Act of 1901. The amendment had absolutely nothing to do with Army appropriations but specified the conditions under which the United States might intervene in the internal affairs of Cuba. The procedure is rightly considered as undemocratic since by using it, a House that is of a different party than that of the Senate or Presidency, can usually amend the appropriation bill with legislation that could not stand by itself, and since the appropriation bill is rarely subjected to a veto because of the fiscal needs of the Governmental operation, the controversial piece of legislation rides through. That is exactly what will be claimed in this case by both the Chairman of the Armed Services Committee (who wanted to hold his own hearings on Mr. Sikes' original bill) and the President, in his scathing message approving the bill and disapproving (technically, illegally) section 638.

Mr. Dewey continues his testimony by giving the philosophy of most of the opponents of the section. His remarks here are echoed by each of the succeeding witnesses:

> We are somewhat concerned that the impetus for the inclusion of section 638 in the Defense Department Appropriations Act might be based upon the trumped-up hysteria in certain quarters that the Hoover Commission recommendations are the cause of every recent change in the Military Est-

ablishment, especially if it involves reduction of personnel. Actually, as this committee well knows, the issue of the degree to which the Government should engage in business activities antedates the Hoover Commission by a number of years. Further, congressional interest in the matter has brought about many constructive changes during the course of those investigations, and the Hoover Commission, in its recent reports, has emphasized once again the salient points in this controversy, which are:

1. Government businesses pay no taxes.

2. Government businesses deprive the Government of taxes that would otherwise be paid from private sources.

3. Government cost figures are incomplete and most accounting records are inadequate since many overhead and expense items are omitted.

4. Government enterprises are in many cases responsible for unfair competition.

5. Government enterprises tend to perpetuate themselves.

6. Government enterprises tend to spawn other Government enterprises of a corollary or support nature.

Members of this committee will recall that in the 83rd Congress, both the House and the Senate Government Operations Committees considered legislation dealing with the same issue which is raised in section 638. The House passed H. R. 9835 and the Senate Committee passed an amended version, the substance of both bills being to provide the machinery for adjudicating which of the many Government enterprises are necessary to be retained. The fundamental difference between last year's legislation and section 638, however, is that the executive department rather than congressional committees would serve as the investigatory body (Department of Commerce) and the President would exercise the final judgment as to whether a Government enterprise should cease or continue, depending upon the national interest involved.

Let me insert that I certainly am not wedded to the manner in which these things should be done in the executive department. The point I am raising is simply that this myriad of details is better handled by executive department committees that are familiar with the business that the Government is engaged in.

It is our hope that the Appropriations Committee will not tie the hands of the substantive committees of Congress to consider once again in this Congress this important question of public policy.

Every well-run enterprise should have the flexibility institute economies on its own without being forced to go to the board of directors for every decision . Section 638, however, would require the Defense Department to consult a special board of directors sitting as a committee of Congress to get clearance as to whether or not the Department could institute an economy or divest itself of some commercial-type enterprise. The administrative problems and the political manipulations in such a procedure would indeed be formidable.

Finally, I would like to quote from an address by General Eisenhower, then Chief of Staff, made in Detroit on June 3, 1946, in which he states:

> In general, the more use we are able to make of outside resources the more energy the Army will have to devote to strictly military problems for whose solution there are no outside facilities, or which, for special security reasons, can only be handled by the military.

General Eisenhower's words might well be a summation of the widely held view that the Defense Department should use outside facilities wherever possible and confine itself to essential or noncompetitive business functions. There is a long way to go before this goal outlined by General Eisenhower will be achieved, but progress is being made all the time. We earnestly urge that section 638 not be placed as a roadblock toward achieving this goal.[1]

Thus testified Mr. Dewey of the Pacific American Steamship Association. Mr. Dewey was briefly questioned by the subcommittee members but added substantially nothing to his original statement and then stepped down to relinquish the witness chair to a procession of twelve other 'Washington representatives' presenting the views of the National Wooden Box Association, the National Associated Businessmen, the Chamber of Commerce of the United States, the American Warehousemen's Association, the National Paint, Varnish, and Lacquer Association, the Transportation Association of America, the Cordage Institute, the Movers Conference of

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[1]Ibid.

America, the Association of Professional Photogrammetrists, the International Association of Ice Cream Manufacturers, the American Association of Nurserymen, and the American Retail Federation. This last federation is a federation of all the retail associations and comprises more than 700,000 retail outlets of all types and sizes throughout the country; the list of associations making up this federation is impressive if not staggering. And in addition to this array of merchants of every size, shape, and description testifying against the section, there was read into the record three letters from an equally powerful and impressive faction; one from former Senator Herbert R. O'Conor of Maryland, representing the American Merchant Marine Institute, one from Mr. Henry G. Riter, 3rd, President of the National Association of Manufacturers, and last but not least, one from Secretary of Commerce Sinclair Weeks.

Before proceeding with the high lights and salient points of the testimony of these high powered men of national stature, the fact should be emphasized now for clarity and it will be reiterated again later that no person, association, or government official testified in favor of this section. Not a single line appears in the hearings in support of section 638 or in rebutal of the arguments put forth to strike it out of the bill.

The next witness was Mr. C. D. Hudson, executive vice-president of the National Wooden Box Association. His testimony was a reiteration of Mr. Dewey's statements, both the prepared statement for the record and his verbal statements as a witness. However, two points can be cited as pertinent; first, Mr. Hudson

also objected to the wording of section 638, as follows:

> I will not go into detail with regard to this section, but in our opinion this section would slow down, or perhaps nullify existing directives which have resulted in considerable progress toward getting the Government out of the wooden-box business as well as out of many other lines.
>
> The section itself is so vague as to lead inevitably to administrative difficulties, in our opinion.
>
> The word 'traditional' appears there. Tradition is defined by Webster as something handed down from the past, an inherited culture, attitude, et cetera. The term 'appropriate committee' is carried in that section. There again there is indefiniteness and vagueness.

and secondly, and much more important than the vagueness of the wording or the impact of the section on the wooden-box industry, is the disclosure during cross examination by the chairman of the sub-committee of the following bit of intelligence that is worth quoting verbatim:

> Senator CHAVEZ: I will make this statement before you leave, Mr. Hudson: We have a tremendous amount of correspondence dealing with this particular section. It is about 40 to 1 on your side, Mr. Hudson.

That is the first indication of the tenor of the 'grass roots' sentiment on the issue. It is amazing to tabulate these simple facts; with the witnesses appearing before the sub-committees 100% against the section, with the correspondence of the members running 97½% against the section, with the Congressional debate (as we shall see later on) preponderately against the section, with the executive department against the section, Section 638 survived the attacks from all quarters and remained in the bill until signed into law. However, let us continue to examine the progress in logical sequence and return to the Senate sub-comittee and the next witness.

The next witness was Mr. Elton Kile, president of the National Associated Businessmen, Inc., who submitted for the record a prepared statement which was an excellent dissertation and a well-documented, lucid, interpretation of the case. Some of Mr. Kile's statements are worth lifting out of his text and quoting here since they provide a wealth of background and historical information, the understanding of which makes the end result in this case the so much more illogical and obscure.

> Mr. Kile: ....Let me say at the beginning that the Federal Government has been in various kinds of commercial, industrial, and financial business for a great number of years. The ropewalk at the Boston Navy Yard was set up by President Andrew Jackson more than 120 years ago, so the Navy would not be dependent upon Russian hemp. The Navy's paintmaking factories began as an experiment more than half century ago. The roasting of coffee, the manufacture of spectacles, false teeth, and wooden legs, the baling of scrap metal, and the scores of other activities were begun, you may be sure, with no thought that they would go on for ever. As the Hoover Commission stated recently: "Government creates business-type enterprises in economic emergencies, in the emergencies of war, and for the development of projects which are not adapted to private enterprise." But, as this report goes on, by the time their tasks have been completed they "resist termination".

Mr. Kile's statement goes on from there to trace the Congressional efforts to reverse this trend, beginning with the Shannon Committee of twenty-five years ago, the Bonner Committee which filled four volumes with exhaustive and comprehensive testimony in 1952, and the Harden committee going over the same ground in 1953 and 1954. The historical section is brought up to date by citing the bills before the last two sessions of Congress, namely H. R. 9835 which passed unanimously at the previous Consent Calender of the House but died in the Senate because of adjournment,

and S. 1003 of the 84th Congress, which states in no uncertain terms as a declaration of policy:

> ".....It is the declared policy of the Congress that the Government shall get out and stay out of business-type competition....."

Another interesting point which Mr. Kile drove home in a blunt, straight-from-the-shoulder attack was the following:

> It must be perfectly evident to anyone that section 638 could have no effect in the world other than to perpetuate every business activity in the Defense Department. You know and I know and every one of the 435 Members of the House knows that economy in Government is always highly desirable in the opinion of every Congressman until it hits a project in his own district; and in the same way we all know that the termination of Government's competitive business activities is a fine and praiseworthy idea until it runs afoul of some business or other, whatever its nature, in some member's home district. Immediately then, termination is frowned on and resisted. Mr. Chairman, most of the Government business enterprises are located in the districts of Members of Congress, and if section 638 is retained in the Defense Department appropriations bill, it is unlikely that any of them will ever be terminated because they will run into the congressional act of mutual courtesy that is commonly known as logrolling.

That is only a small sample of Mr. Kile's statement. He presented his case bluntly but well. The truths he was demonstrating could not do anything else but make a profound impression except that Mr. Kile and all the witnesses past and yet to come were not faced by an opposition which dealt in logical arguments on the merits of the case. They were opposed by the legislators' self-interest which was a difficult opponent no matter how the situation is viewed.

Rather than continue to belabor the point with repetition or sheer weight of numbers, the testimony of the other witnesses will be placed in a recommended reading category. Their testi-

mony merely adds weight and substance to those that have gone before without the addition of any new argumentative points. However, the complete story is impressive and to get the feel and the sense of the entire argument the source material is well worth reading and is highly recommended.[1]

Perhaps the story has gotten a little ahead of itself. Let us focus attention upon the debates on the floor of the House; on Thursday, May 12, 1955, Mr. Mahon moved that the House resolve itself into the Committee of the Whole House on the State of the Union for the further consideration of the Department of Defense Appropriation Bill, H. R. 6042. Late in the course of the debate for that day, Mr. Vinson of Georgia, offered an amendment to strike out Section 638 of the bill on the grounds that it was legislation and did not belong in the appropriation bill and, further, that H. R. 5115, Mr. Sikes' bill dealing with the exact same subject was already before the Committee on Armed Forces. Mr. Taber and Mr. Cannon both immediately jumped to their feet to compliment Mr. Vinson on submitting the amendment; to which Mr. Vinson gallantly replied that when he found the gentleman from New York and the gentleman from Missouri agreeing with him, he knew he was on sound ground. However, once the preliminary pleasantries were gotten out of the way Mr. Vinson, the chairman of the Armed Services Committee, and as such, is not only one of the senior members of the House, but also an authority of some note on the subject matter, got down to a serious, well-thought out attack on section 638. The main part of Mr. Vinson's speech on the floor is well worth quoting verbatim since it gives still another side of the multifaceted argument.[2]

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[1]Ibid.

[2]Congressional Record--HOUSE, May 12, 1955 p. 5306

Mr. Vinson: .....Let the House understand this. If you want the Government in business, you put section 638 in the bill. I do not want Government in business. I want private enterprise in this country to operate; I want small business in this country. There are certain things it is necessary for the Department of Defense to do, and it is all right to do that, but there are hundreds of things that the Department of Defense is engaged in that private enterprise can do. Private enterprise has to support this country. You have to get taxes out of business to maintain the Department of Defense.

I am not going to take any longer, and everybody understands it. I hope you will vote for this amendment.

Section 638 prohibits the Department of Defense from using any funds appropriated under this act for the disposal or transfer, by contract or otherwise, of work traditionally performed by civilian personnel of the Department of Defense unless it has been justified before the appropriate committees of Congress as economically sound and being without injury to the national security.

Were it in order for me to do so I would make a point of order objection to this section because it is clearly subject to one. But again I am precluded because of the nature of the rule under which we are now proceeding. Therefore, I shall base my objection on the merits of the case.

First, I would like to say that the inclusion of this section somewhat surprises me. I can find no testimony in the hearings of the Appropriations Committee to help us understand it and to justify its inclusion.

While I do not know who the sponsor might be, I would like to point out that the gentleman from Florida (Mr. SIKES) introduced H. R. 5115 on March 21 and it was referred to the House Committee on Armed Forces. I referred it to the Department of Defense on March 23, requesting a report and I would like to point out that the bill now pending before the House Armed Services Committee is almost identical to the provisions of section 638.

If the author of the bill or any other Member would like for the Armed Services Committee to hold a hearing on the bill, the committee will be glad to do so.

Now what would this section accomplish if enacted ? As I understand it, it would prevent the Department of Defense from transferring to private enterprise any work which was traditionally performed by civilian employees of the Department of Defense unless such transfer were first justified before the appropriate committee of Congress.

We find ourselves in a strange situation. It is the current policy of the Department of Defense, dated April 27, 1955, to use privately operated industrial and commercial-type facilities to the greatest extent practicable.

Under that policy it is proposed that everything which can be done by private enterprise, without endangering the national defense, will be done. As I read the section it would require that the Congress would first have to give their permission to the Department of Defense before they could implement this policy.

I would like to point out that the criticism of the services staying in this kind of business was not raised by the House Armed Services Committee. It was raised by another committee of the House which conducted extensive hearings and made many far-reaching recommendations on this precise subject, which recommendations have been faithfully carried out by the Department of Defense.

So, in spite of the mandate of one standing legislative committee of the House that the Department of Defense turn over to private industry their commercial and industrial type operations, to the greatest possible extent, we now find a section in this bill which would prevent the Defense Department from doing this without first getting the permission of some committee of Congress.

Most of this type of activity involves small business. Every day we try to help small business but in this procedure you simply place another stumbling block in their way.

The language in section 638 is so unclear that it would be almost impossible to interpret it. For instance, what is 'traditional' work ? Is it work performed for 5 years, 50 years, or 100 years ? Or what other yardstick do you use to establish the meaning of 'traditional' work ? Frankly, I do not know and I don't see how anyone else could know under the language in this section.

The issue is clear cut. One committee of the Congress has insisted that the Defense Department get out of these commercial-type activities and turn them over to small business and the other elements of private industry.

The Defense Department has agreed and adopted such a policy. In addition, there is a bill pending before the House Armed Services Committee on this very subject.

For these reasons I urge the Members to support my amendment in order that we may conduct our business in the Congress in an orderly and intelligent manner.

At the conclusion of Mr. Vinson's remarks there ensued the usual parliamentary hasselling with substitute amendments completely negating the elimination of section 638 being offered, and various members offering such remarks as they could get in prior to a vote. Of these, altho most were merely sound and fury (signifying nothing), the remarks of Mr. Brooks of Louisiana are worth noting since they interject still another facet.

> Mr. Brooks: Is this not just another attempt on the part of the Congress to really run the executive branch of the Government ? Is this not just another effort to prevent the Department of Defense from handling its own executive business, as was intended to be prevented by the Constitution of the United States to be the case.
>
> To which Mr. Vinson replied: The gentleman from Louisiana is absolutely correct.....

An interesting thing now occurred; on a teller vote, Mr. Vinson's motion that section 638 be struck from the bill carried by 160 to 134 --- but an hour later, when a rollcall was ordered, the section was reinstated by 202 to 184. Immediately following this, the bill was passed on a rollcall vote by 382 to 0, with 52 not voting.

Mr. Vinson, a senior member of the House with many years of political campaigning and parliamentary maneuvering behind him, saw this section of the bill for what it was: an attempt to pass legislation by an appropriation bill rider. In addition to that major fault, the section was contrary to the stated policies of both houses of Congress as well as the Executive branch, and further, he saw it as an unwarranted (and possibly unconstitutional) infringement by Congress on the powers of the Executive branch. The wonderment of it all is that the section is able to move right

along on its road to becoming law without too much interference. Under the budgetary process, as practiced in the United States Congress, the inference as to the power of a appropriation sub-committee chairman is plain.

Before leaving the House's treatment of Section 638, it might pay, in the interest of greater understanding, to look back at the Committee on Appropriations report on H. R. 6042[1] and see exactly what Mr. Vinson was referring to when he said that the Appropriations Committee held no hearings on this section, yet they did render an opinion and recommendation to the House 'to help them understand it'.

The report submitted by the Committee on Appropriations on May 5, 1955 to the House contained the following paragraph:

> Section 638: Attention of the Committee has on a number of occasions been directed toward plans within the Department of Defense for the disposal or transfer by contract or otherwise to contract operations of the work traditionally performed by civilian personnel of the Department of Defense. The Committee recognizes that there may be circumstances which make a contract operation more desirable than continuations of work by civilian personnel within the Department. In some instances, this, however, represents a radical departure from established custom and it is conceivable that contract operations could, if carried to extremes result in a loss of trained personnel and know-how within the departments with the dispersal of tools and facilities and result in an actually greater cost to the Government over a period of years. Particularly would this be true in the event of a sudden emergency which would require rapid expansion of 'on-base' activities. The Committee has no desire to hamper legitimate transferal of government activities to private business where it can properly be shown that this is economically sound and that the related services can be performed by contract without danger to national security. In view, however, of the Government's great investment in its own shops and facilities

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[1] 84th Cong. 1st Session - House of Representatives Report No. 493 To accompany H. R. 6042

and the know-how of its civilian personnel and because of this Committee's responsibility in the matter of appropriations it is felt that a justification of transfers before the appropriate committees of Congress is proper before the transfers take place.

This was indeed a broad, sweeping, and positive recommendation by the Committee considering that the viewpoint expressed was that of the sponsor of the section without benefit of testimony either for or against the proposal. This was a section important enough to be submitted as an entire bill of its own and, in this form, was being slipped through on greased skids without a hearing of any kind either for or against. Is it any wonder that the Senate hearings on the bill received the action (perhaps 'reaction' is a more exact word) they did.

Although not presented in this treatise in exactly that precise order, it is of the utmost importance for proper comprehension to keep the chronology and sequence clearly in mind. Section 638 was indeed a 'sleeper' in that for five months it lay well buried in the House Appropriations Committee and Sub-committees receiving no action, no publicity, and no testimony. It is only in May, after the debates on the floor of the House gave the section an airing and exposed it to the light of day, that the opposition to it began to clamor to be heard.

We have already indicated the weight and volume of the testimony at the Senate Appropriation Sub-committee hearings, and have examined minutely some of the more typical arguments given. Let us now examine the report of the Senate Sub-committee as they 'reported the bill out' to the Senate. Remember that the Sub-committee members have most certainly read Mr. Vinson's speech on the floor of the House in the Congressional Record, and that

the testimony of every witness appearing before the Sub-committee has been 100% against the bill, and that the chairman of the Sub-committee admitted that he was receiving considerable quantities of correspondence running 40 to 1 against the bill, it raises an eyebrow, perhaps, and provokes just a little speculation when the Senate Sub-committee report contained the following:[1]

TRANSFER OF CIVILIAN PERSONNEL FUNCTIONS

The bill as it came from the House included section 638 as follows:

Sec. 638. No part of the funds appropriated in this Act may be used for the disposal or transfer by contract or otherwise of work traditionally performed by civilian personnel of the Department of Defense unless it has been justified before the appropriate committees of Congress that the disposal is economically sound and that the related services can be performed by a contractor without danger to national security.

The committee recommends the deletion of this section and the insertion of the following section:

Sec. 638. No part of the funds appropriated in this Act may be used for the disposal or transfer by contract or otherwise of work that has been for a period of twenty-five years or more performed by civilian personnel of the Department of Defense unless certified by the Secretary of Defense and reported by him to the Appropriations Committees of the Senate and House of Representatives at least sixty days in advance that the disposal is economically sound and that the related services can be performed by a contractor without danger to national security.

The derivation of this Senate version Section 638 is hardly capable of comprehension from the hearings but it comes to light in wryly humorous fashion when one turns to the debates on the Senate floor.[2]

On Monday, June 20, 1955, H. R. 6042 was being debated before the Senate and late in the proceedings Senator Mundt of

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[1] 84th Cong 1st Session SENATE Report No. 545 June 14,'55 Committee on Appropriations Report on H. R. 6042

[2] Congressional Record Vol. 101 No. 103 Mon. June 20,'55 Senate pp 7417 - 7424

South Dakota introduced an amendment the purpose of which was to strike from the Senate version of the bill all of section 638. Senator Mundt went on to say that he was the author of the change in language of the section to its present form from that version that had passed the House but he was now convinced that the 'socialistic enterprises' should be eliminated and the section should be stricken out in its entirety.

Senator Mundt was chided both by Senator Chavez and Senator Robertson for being so "persuasive upon a majority of the members of the committee, including all the Democratic members, that he convinced the committee that the language he proposed to add to the bill would take the government out of socialistic enterprises generally" and now he wanted to kill the section entirely.

Senator Thye of Minnesota wanted to change the "25 years" in the section to "40 years" because "if we went back 40 years, we would include the era when most of these governmental activities came into being". This amendment was quickly beaten.

Mr. Mundt's strategy was disclosed as "we can do all this in conference much better by adopting my amendment striking out the entire paragraph and putting the entire situation in conference."

The debate then broke into full swing with the same arguments we have gone over before being put forth by many different Senators. The end result was that the Mundt amendment was defeated 48 to 33 which meant that the section as reworded by Senator Mundt, and which he was now trying to disavow, stayed in. The Senate version of H. R. 6042 was then passed 80 to 0 and a conference was asked for with the House to resolve differences.

On June 29, 1955, Mr. Mahon, from the committee of conference, submitted a Conference Report[1] in which Section 638 was one of the four amendments on which the committee was forced to report in disagreement. Out of thirty-five points of difference between the House version of the Department of Defense Appropriation Bill, 1956 and the Senate version of the bill, agreement could be found on thirty-one points involving billions of dollars, but Section 638 was controversial enough to have to be reported in disagreement, in that no points of common ground could be reached in the conference committee.

Time was of the essence; this bill was supposed to go into effect on July 1, 1955. Time probably more than anything else forced an agreement over the section which evolved into a hodge-podge of both versions when it was finally passed by both houses and sent to the President for approval. The wording as written into Public Law 157 was:

> SEC. 638. No part of the funds appropriated in this Act may be used for the disposal or transfer by contract or otherwise of work that has been for a period of three years or more performed by civilian personnel of the Department of Defense unless justified to the Appropriations Committees of the Senate and the House of Representatives, at least ninety days in advance of such disposal or transfer, that its discontinuance is economically sound and the work is capable of performance by a contractor without danger to the national security: PROVIDED, That no such disposal or transfer shall be made if disapproved by either committee within the ninety-day period by written notice to the Secretary of Defense.[2]

Thus after a complicated gestation period Congress had finally given birth to its brain-child; but the really pains were to come with the afterbirth, as we shall see in the next chapter.

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[1] 84th Cong 1st Session HOUSE OF REPRESENTATIVES Report No. 1030 CONFERENCE REPORT to accompany H. R. 6042

[2] Public Law 157 - 84th Congress Chapter 358 - 1st Session

CHAPTER III

THE PRESIDENT'S APPROVAL AND THE CONGRESSMAN'S REBUTAL

On July 13, 1955, H. R. 6042 became Public Law 157 by the affixing of the President's signature indicating approval. One could hardly call it an approval though because, as noted previously, the approval was accompanied by a stinging message bristling defiance and threatening non-compliance with Section 638. The President's exact words will stand alone; no mere summary, or commentary will do them justice.

TO THE CONGRESS OF THE UNITED STATES:

> I have today approved H. R. 6042, making appropriations for the Department of Defense for the fiscal year ending June 30, 1956, and for other purposes. I have done so because the funds which the bill makes available are urgently needed by the Department of Defense. Except for this imperative need, I would have withheld my approval of the bill, for I am advised by the Attorney General that one of its provisions, section 638, constitutes an unconstitutional invasion of the province of the Executive.
>
> Section 638 deals with the authority of the Department of Defense to rid itself of many of the manifold activities that it has been performing with its civilian personnel, and that can be adequately and economically performed by private industry without danger to the national security. That section states that funds appropriated in the bill cannot be used to enable the Secretary of Defense to exercise this authority if, in the case of any activity of the Department proposed to be terminated, the Appropriations Committee of the Senate or the Appropriations Committee of the House of Representatives disapproves such proposed termination.
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> The Constitution of the United States divides the functions of the Government into three departments --- the legislative, the executive, and the judicial --- and

establishes the principle that they shall be kept separate. Neither may exercise functions belonging to the others. Section 638 violates this constitutional principle.

I believe it to be my duty to oppose such a violation. The Congress has the power and the right to grant or to deny an appropriation. But once an appropriation is made the appropriation must, under the Constitution, be administered by the executive branch of the Government alone, and the Congress has no right to confer upon its committees the power to veto Executive action or to prevent Executive action from becoming effective.

Since the organization of our Government, the President has felt bound to insist that Executive functions be maintained unimpaired by legislative encroachment, just as the legislative branch has felt bound to resist interference with its power by the Executive. To acquiesce in a provision that seeks to encroach upon the proper authority of the Executive establishes a dangerous precedent. I do not, by my approval of H. R. 6042, acquiesce in the provisions of section 638, and to the extent that this section seeks to give to the Appropriations Committees of the Senate and House of Representatives authority to veto or prevent Executive action, such section will be regarded as invalid by the executive branch of the Government in the administration of H. R. 6042, unless otherwise determined by a court of competent jurisdiction.....[1]

That throws down the gauntlet in no uncertain terms. The message does not even sound like Dwight D. Eisenhower, either in tone or in substance. Actually, what he is proposing is exchanging one unconstitutional act for another; he proposes that for expedience sake he will sign the bill into law, but he gives fair warning that he regards the law as unconstitutional and will disregard such section as he deems fit. This precedent is even more dangerous than the one he is claiming the bill is setting. There is no need for legislation allowing a 'line item veto' if this philosophy is followed to its logical conclusion.

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[1]84th Cong 1st Session HOUSE OF REPRESENTATIVES Document No. 218 Message from THE PRESIDENT OF THE UNITED STATES approving H. R. 6042

The first reaction following the clerk's reading of the President's message was a rather surprising one. Congressman Springer had inserted in the Congressional Record[1] immediately following President Eisenhower's message the following extension of his remarks on the bill:

> Mr. SPRINGER. Mr. Speaker, I am glad that in his message the President has discussed section 638 of H. R. 6042, making appropriations for the Department of Defense for the coming year.
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> When this matter was before the House several days ago, many of us took the position that section 638 was a bad section and should not have been in the bill. In the first place it made it impossible for the executive department to get rid of certain business activities that it has been performing with civilian personnel in the Armed Forces establishment. I realize there are certain members of the House who have these activities in their district and they do not want to see them closed, even though the Defense Department can get along without them or they could be better done by private industry.....
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> .....There were many of us who felt that section 638 would effectively tie the hands of the executive department to continue to economically perform the activities of the defense establishment. That section makes it necessary for the Secretary of Defense to come back and get the approval of the Appropriations Committee of the House or the Senate. I am sure that every Member of the House understands that there will be a considerable reluctance of members of that committee to allow termination of these activities in bases in their districts. In addition, this section makes it possible for other Members of Congress to run to the Appropriation Committee for help any time that the Defense Department asks to terminate these civilian activities in their districts. All in all, it creates a very difficult situation for the Department of Defense to effectively perform its function. I think I can safely say that all the good work which the executive department has been doing along this line would be curtailed.
>
> I am not in anyway attempting to go into the legal question involved which the President had discussed at some length upon the advice of the Attorney General. That is a very technical legal point and I would certainly wish to examine the statutes and decisions at greater length before trying to pass an opinion on that matter.
>
> My only purpose at this time is to point out the fact that section 638 was bad legislation when it was passed

and it is bad legislation today and never should have been put in the bill in the first place. It has a poor morale effect upon those administering the defense establishment and in my opinion section 638 should be repealed.[1]

There we have the practical congressman's view of the log-rolling and behind scenes manipulations that this section is bound to generate despite all of the sponsor's high sounding fears for the national security and doubts about the motives, judgment, and altruism of the Executive Department. How can the final decision be shifted to the shoulders of congressmen who are much more susceptible to pressure groups from the very districts that stand to lose if any activity is to be eliminated. The end result could only be the situation that Mr. Vinson foresaw and predicted in his remarks.

The last word in this case has been reserved for Mr. Sikes who as the sponsor of H. R. 5115, has undoubtedly been a sponsor and proponent of section 638; and from his position as a member of the Appropriations Committee and the chairman of the Department of the Army Appropriations Sub-committee was in a position to lead it past the many obstacles thrown in its way to its finally achieved place as a part of Public Law 157. Mr. Sikes spoke before the House on the same day as the President's message was received but later on in the proceedings for the day.

Mr. SIKES. Mr. Speaker, a little while ago I listened to an amazing message from the President on the bill H. R. 6042, the Defense Department Appropriation Act for the fiscal year 1956. In that message the Chief Executive challenged the constitutionality of a section of the bill, but in the same breath placed himself and the executive department above the constitution. I was completely astounded. I was shocked. Seldom have I heard such complete and utter disregard for the rights and privileges

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[1]Congressional Record -- House July 13, 1955 p. 8997

of Congress or of the constitutional processes of law.

To me, it is unbelievable that the Chief Executive of this great Nation would in this way seek to place himself above the law and to set aside a section of law that he or someone who speaks for him does not like. This is veto by paragraph, and veto by paragraph is not legal. This is usurpation of the powers of the Congress.....

.....May I point out, Mr. Speaker, that limitations on appropriations acts are not new. There have been similar provisions in many acts of Congress. Some are in effect now and they present no serious difficulties in operation. The disposal of real estate and various other matters are reported to the Congress periodically by the departments administering such laws. They are safeguards whose use has been found wise. Section 638 was modeled on these provisions.....

I would remind Mr. Eisenhower that this is not a military government. This is not a government under martial law. We live under a civil government, and all Americans under our Constitution are bound by the same laws.[1]

This is as good a place as any to ring down the curtain on this study of just one small facet of the congressional segment of the budgetary process in the United States. Each side is now down to invective and badinage accomplishing nothing. One thing is, however, certain; section 638 is the law of the land. For one year, until June 30, 1956, anyway.

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[1]Congressional Record -- HOUSE July 13, 1955 p. 9005

CHAPTER IV

CONCLUSION

A moment of thoughtful reflection upon the narrative just unfolded offers some interesting, if not startling, deductions. Under the budgetary process in the United States, is it really a fact that the will of the chairman of a congressional sub-committee can over-ride the executive branch, the business interests, the avowed and often stated traditional congressional policy of government withdrawal from competition with private interests, and even the outspoken opposition of influencial members of his own party ? Why could section 638 muster a majority of votes each time it was put to the test ? In spite of all the influencial and weighty opposition, each hurdle, each obstacle was surmounted in turn. Was this because Congress was zealously guarding its prerogatives and powers to create and destroy governmental activities through budgetary action ? Was it because the Congress traditionally pays lip service to high sounding and lofty ideals such as 'government withdrawal from competition' but votes individually, each according to his local self interest vice statesman-like national interest ? Was it because the sponsor of the section could project his fears for the national security under

the Defense Department's stated policy of withdrawal from industrial and commercial-type activities into support for section 638 ? Or was it mutual logrolling to prevent home district activities from being disestablished by a 'businessman's' executive branch of government? In any case, the fact is there --- section 638 was enacted into law against all opposition --- and the exact reason it was able to defeat all opposition remains as subtle and illus- as ever. The incongruousness and illogicalness of the result is just accepted with the knowledge that it could only happen under the budgetary process as practiced in the United States.

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